Supreme Court, U.S.
FILED

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No. _____

In the
SUPREME COURT OF THE UNITED STATES

PROGRESS RAIL SERVICES CORPORATION and
RAILCAR, LTD.,
Petitioners,
v.
ALLFIRST BANK,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Eleventh Circuit Court of Appeals issue a writ of mandamus directing the United States District Court for the Northern District of Georgia, Atlanta Division (the "district court"), to take all reasonable steps to promptly retrieve the case files from the United States District Court for the District of Maryland, to enable the Eleventh Circuit to reacquire its appellate jurisdiction of the case and to review the district court's order, where the district court has (i) denied the petitioners' motion for remand to state court without deciding the issues raised in the motion and without allowing the petitioners to file a reply to the respondent's response to the motion as was petitioners' right under the local rules, (ii) ordered the case transferred to a district court outside of the appellate court's circuit, and (iii) transferred the case files on the same day that it entered the transfer order, thereby depriving the petitioners of their rights to seek reconsideration or appellate review in the same circuit?

2. May the Eleventh Circuit review the district court's order regardless of whether it recovers the physical case files?

3. Should the district court have remanded the case to the state court?

4. Did the district court improperly shift the burden of proof and persuasion to the petitioners and clearly abuse its discretion by transferring the case to a district court in Maryland?

PARTIES TO THE PROCEEDING

There are no parties in addition to those named in the caption to the case.

CORPORATE DISCLOSURE STATEMENT

Progress Fuels Corporation (f/k/a Electric Fuels Corporation)

Progress Capital Holdings, Inc.

Florida Progress Corporation, and Progress Energy, Inc.

Progress Rail Services Corporation is the parent company of Railcar, Ltd.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding and Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Authorities	iv
Citations of Reports of Orders and Opinions Below	1
Statement of Jurisdiction	1
Statute Involved	2
Statement of the Case	2
Reasons for Granting the Writ	6
Conclusion	29

Appendices:

Order and opinion of U.S. Court of Appeals for the Eleventh Circuit	A-1
Order and opinion of U.S. District Court for the Northern District of Georgia, Atlanta Division, entered on October 2, 2001	B-1
Order and opinion of U.S. District Court for the Northern District of Georgia, Atlanta Division, entered on January 7, 2002	C-1

TABLE OF AUTHORITIES

Statutes	Page
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1292(b)	3, 14
28 U.S.C. § 1294	28
28 U.S.C. § 1404(a)	2, 3, 8, 9, 12, 18, 25, 27
28 U.S.C. § 1406(a)	12
O.C.G.A. § 14-2-1501	14, 15, 17
O.C.G.A. § 14-2-1502	15

Cases

A. Olinick & Sons v. Dempster Brothers, Inc., 365 F.2d 439 (2d Cir. 1966)	19
Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33 (1980)	18
Autoridad de Energia Electrica de P.R. v. Ericsson, Inc., 201 F.3d 15 (1st Cir. 2000)	25
Bankers Life & Casualty Co. v. Holland, 346 U.S. 379 (1953)	12
In re Chatman-Bey, 718 F.2d 484 (D.C. Cir. 1983)	18

Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509 (10th Cir. 1991) 10, 11

Citro Fla., Inc. v. Citrovale, S.A., 760 F.2d 1231 (11th Cir. 1985) 24

Colo. v. Symes, 286 U.S. 510 (1932) 13

Commonwealth of Pa. v. Newcomer, 618 F.2d 246 (3d Cir. 1980) 13

Elect. Transaction Network v. Katz, 734 F. Supp. 492 (N.D. Ga. 1989) 26

Fine v. McGuire, 433 F.2d 499 (D.C. Cir. 1970) 10, 11, 12, 17, 18

Golconda Mining Corp. v. Herlands, 365 F.2d 856 (2d Cir. 1966) 18

Grey v. Cont'l Mktg. Assocs., Inc., 315 F. Supp. 826 (N.D. Ga. 1970) 26

Keaty v. Freeport Indon., Inc., 503 F.2d 955 (5th Cir. 1974) 25

Kinetic Concepts, Inc. v. Kinetic Concepts, Inc., 601 F. Supp. 496 (N.D. Ga. 1985) 17

La Buy v. Howes Leather Company, 352 U.S. 249 (1957) 9

Md. v. Soper (No. 1), 270 U.S. 9 (1926) 13

Maseda v. Honda Motor Co., Ltd., 861 F.2d 1248 (11th Cir. 1988) 14

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, 675 F.2d 1169 (11th Cir. 1982) 19

Morgan Guar. Trust Co. of N.Y. v. Blum, 649 F.2d 342 (5th Cir. Unit B 1981) 14

NBS Imaging Sys. v. United States Dist. Court for the Eastern Dist. of Cal., 841 F.2d 297 (9th Cir. 1988) 11

In re Nine Mile Ltd., 673 F.2d 242 (8th Cir. 1982) 10, 11

Peridyne Tech. Solutions, LLC v. Matheson Fast Freight, Inc., 117 F. Supp.2d 1366 (N.D. Ga. 2000) 22

Plum Tree, Inc. v. Stockment, 488 F.2d 754 (3d Cir. 1973) 25, 26, 27

Poirrier v. Nicklos Drilling Co., 14
648 F.2d 1063 (5th Cir. Unit A 1981)

R. N. Kelly Cotton Merch., Inc. v. York, 17
379 F. Supp. 1075 (M.D. Ga. 1973)

In re Ralston Purina Co., 19
726 F.2d 1002 (4th Cir. 1984)

Roche v. Evaporated Milk Ass'n, 9, 13
319 U.S. 21 (1943)

Roofing & Sheet Metal Svcs., Inc. 3, 4, 10, 12, 18
v. La Quinta Motor Inns, Inc.,
689 F.2d 982 (11th Cir. 1982)

S & H Contractors, Inc. v. A. J. Taft 15
Coal Co. Inc., 906 F.2d 1507
(11th Cir. 1990), cert. denied,
498 U.S. 1026 (1991)

SAR Mfg. Co. v. Dumas Bros. Mfg. Co. Inc., 15
526 F.2d 1283 (5th Cir. 1976)

In re Scott, 709 F.2d 717 (D.C. Cir. 1983) 18

Snapper, Inc. v. Redan, 24
171 F.3d 1249 (11th Cir. 1999)

Starnes v. McGuire, 10, 11
512 F.2d 918 (D.C. Cir. 1974)

Technitrol, Inc. v. McManus, 10, 11
405 F.2d 84 (8th Cir. 1968),
cert. denied, 394 U.S. 997 (1969)

Toro Co. v. Alsop, 565 F.2d 998 (8th Cir. 1977) 19

Transp. Ins. Co. v. El Chico Rests., Inc., 15
271 Ga. 774, 524 S.E.2d. 486 (1999)

Ukiah Adventist Hosp. v. F.T.C., 18
981 F.2d 543 (D.C. Cir. 1992)

In re Warrick, 70 F.3d 736 (2d Cir. 1995) 11

Winston Corp. v. Park Elec. Co.,
126 Ga. App. 489, 191 S.E.2d 340 (1972) 17

Other

15 C. Wright, A. Miller & E. Cooper, Federal
Practice and Procedure § 3846 28

15 C. Wright, A. Miller & E. Cooper,
Federal Practice and Procedure § 3855 18

Stowell R.R. Kelner, Note, "Adrift on an Uncharted Sea:" A Survey of Section 1404(a) Transfer in the Federal System, 67 N.Y.U. L. Rev. 612 (1992) 8

Richard L. Marcus, Conflicts among Circuits and Transfers within the Federal Judicial System, 93 Yale L.J. 677 (1984) 8

Robert A. Ragazzo, Transfer and Choice of Federal Law: The Appellate Model, 93 Mich. L. Rev. 703 (1995) 8

Joan Steinman, Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation, 135 U. Pa. L. Rev. 595 (1987) 8

CITATIONS OF REPORTS OF ORDERS AND OPINIONS BELOW

The order and opinion of the United States Court of Appeals for the Eleventh Circuit (Edmondson and Wilson, Circuit Judges) entered on December 31, 2001, has not been reported and is set forth in the appendix beginning at page A-1.

The order and opinion of the United States District Court for the Northern District of Georgia, Atlanta Division (Thrash, J.), entered on October 2, 2001, has not been reported and is set forth in the appendix beginning at page B-1.

The order and opinion of the United States District Court for the Northern District of Georgia, Atlanta Division (Thrash, J.), entered on January 7, 2002, has not been reported and is set forth in the appendix beginning at page C-1.

STATEMENT OF JURISDICTION

The order and opinion of the United States Court of Appeals for the Eleventh Circuit was entered on December 31, 2001. (App. A) This petition is filed timely and within 90 days of the denial by the Eleventh Circuit of the petition for writ of mandamus.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

STATEMENT OF THE CASE

Procedural History. Petitioners, Progress Rail Services Corporation ("Progress") and Railcar, Ltd. ("Railcar"), filed this case on August 1, 2001, in the Superior Court of Fulton County, Georgia. Respondent, Allfirst Bank ("Allfirst") removed this case from state court to the United States District Court for the Northern District of Georgia, Atlanta Division ("Atlanta District Court"), on August 24, 2001, on the basis of diversity of citizenship. On August 28, 2001, respondent moved the Atlanta District Court to dismiss this case or, in the alternative, to transfer the case to the United States District Court for the District of Maryland ("Maryland District Court"), pursuant to 28 U.S.C. §1404(a). In response, on September 20, 2001, petitioners filed (i) an opposition to respondent's motion for dismissal or transfer, and (ii) a motion to remand the case to the state court, on the ground that, inter alia, respondent's failure to obtain a certificate of authority to do business in Georgia barred respondent from seeking to remove the action to federal court.

On October 2, 2001, the Atlanta District Court entered an order (the "Order") in which it, inter alia,

(i) denied petitioners' motion to remand the case to state court, without deciding any of the issues presented by that motion and without permitting petitioners to file a reply to respondent's response to that motion as was petitioners' right under the local rules, and (ii) ordered the case transferred to the Maryland District Court pursuant to 28 U.S.C. § 1404(a).

The Atlanta District Court transferred the case records on the same day that it entered the Order, without allowing petitioners to seek review in the circuit in which the Atlanta District Court sits (the Eleventh Circuit).

Petitioners petitioned the Eleventh Circuit Court of Appeals for a writ of mandamus directing the Atlanta District Court and its clerk to take all reasonable steps to promptly retrieve the files from the transferee court. Petitioners also moved the Atlanta District Court to certify the Order pursuant to 28 U.S.C. §1292(b) for review by the Eleventh Circuit or, in the alternative, to vacate the Order.

On January 7, 2002, the Atlanta District Court denied petitioners' motion for certification on the ground that it no longer had jurisdiction of the case.

On December 31, 2001, the Eleventh Circuit denied petitioners' petition for a writ of mandamus and suggested that petitioners seek a retransfer from the Maryland District Court and, if still aggrieved, file an appeal with the Court of Appeals for the Fourth Circuit. The Eleventh Circuit's opinion cites

only Roofing & Sheet Metal Svcs., Inc. v. La Quinta Motor Inns, Inc., 689 F.2d 982 (11th Cir. 1982), which held that the Eleventh Circuit lacked jurisdiction to review a transfer order of a district court embraced by another circuit. That holding does not speak to the question whether the Eleventh Circuit can review a transfer decision (the Order) by a district court in its own circuit. Indeed, in Roofing, the Eleventh Circuit stated that a proper course is to seek mandamus from the court of appeals for the transferor circuit, as petitioners have done here.

Petitioners have done as the Eleventh Circuit suggested to them: On or about November 9, 2001, Petitioners filed a motion with the Maryland District Court seeking to have that court transfer this case back to the Atlanta District Court. On December 27, 2001, the Maryland District Court entered an order denying that motion on the grounds that, inter alia, the Atlanta District Court's decision governs as the law of the case and that the Maryland District Court will not act as an "appellate court" and review that decision.[1]

Since the Fourth Circuit cannot review a decision of the Atlanta District Court, it is now clear that, unless the Eleventh Circuit issues the requested writ of mandamus (or otherwise exercises its appellate jurisdiction) or this Court itself reviews the Order, no court will substantively review the

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[1] The Maryland District Court also suggested that petitioners could have prevented the hasty transfer of the case files by requesting a stay. Yet such a request made recently in another case did not prevent a similar hasty transfer by a judge in the same Atlanta district.

Atlanta District Court's Order.

Nature of the Dispute. This case arose out of certain transactions that petitioners and respondent entered into pursuant to an Assignment Agreement, a related Service Agreement, and a First Loss Deficiency Guaranty ("FLDG"), all dated November 30, 1998 (collectively, the "Agreements"), involving, inter alia, the purchase by respondent from petitioners of 996 railroad cars together with the leases to which the cars were subject. Allfirst became the owner of the cars and the lessor under the leases. Pursuant to the Service Agreement, with respect to each group of cars, Progress agreed to perform certain maintenance and other services for the term of the existing lease. Pursuant to the FLDG, Progress agreed to provide a limited guarantee of the economics of the cars and leases. Progress's cumulative liability under the FLDG is limited to $1,264,167 (subject to adjustment as provided in the FLDG), which represents 9.995% of Allfirst's total purchase price for all of the cars.

The focus of the dispute is the Service Agreement (which has no forum selection clause), and particularly whether Progress has satisfied its obligations under that agreement as to certain coal cars. Allfirst contends that pursuant to the Service Agreement, not the FLDG, after the lease of these cars expired, Progress was required (i) to continue to maintain the cars to meet the hypothetical specifications of a nonexistent lessee, and to do this in a severely depressed market, (ii) to pay Allfirst the target minimum rentals, and (iii) when the cars were sold, to pay Allfirst the amount by which the sales proceeds were less than Allfirst's target sales price

("Stipulated Loss Value"). Progress/Railcar contend that (i) Progress's obligation under the Service Agreement to maintain the cars ended when the cars were returned by the lessee at the expiration of the lease, (ii) it is contrary to the spirit and the express language of the Service Agreement to transmute a repair obligation into a payment guarantee (and thereby sidestep the agreed limitations on liability set forth in the FLDG), and (iii) any obligations to pay target minimum rentals and Stipulated Loss Value shortfalls arose only under the FLDG, not the Service Agreement, and the payments of such amounts made to date by Progress exceed the limit of Progress's liability under the FLDG (as to which excess Progress seeks a refund). Allfirst also alleges nonperformance of obligations under the Assignment Agreement (which, like the Service Agreement, has no forum selection clause). The FLDG between Progress and respondent has a forum-selection clause that permits respondent to bring suit in a federal or state court in Maryland, but does not require that any suit between them be brought in such courts and does not restrict Progress from suing elsewhere.

REASONS FOR GRANTING THE WRIT

1. Importance of the Question. This Court should grant the writ of certiorari to settle an important question of federal law arising from inter-circuit transfers and a longstanding problem in the administration of the federal courts whereby a hasty transfer of case files creates a jurisdictional limbo in which the transfer order and related orders are unreviewable by any court.

Unless this Court makes clear that the appellate court for the circuit in which the transferor court sits should issue a writ of mandamus (or otherwise exercise its appellate jurisdiction) in a case such as this, district courts can continue to insulate their transfer orders and other orders from substantive review by transferring the case records before the party opposing the transfer has time to seek reconsideration or appellate review in the circuit in which the transferor court sits.

Under existing practice, neither the district court nor the appellate court for the transferee circuit will review the transferor court's action. Transferee district courts generally refuse to reconsider the transfer order by invoking an inflexible standard for the "law of the case" (as happened here). Appellate courts for the transferee circuit generally refuse to review the order on the ground that they cannot review a decision by a transferor district court sitting in another appellate circuit (as also is the case here). The only remaining recourse for the party opposing transfer is to move in the transferee district court for a retransfer, which does not afford the party comparable review, for on that motion the party bears the burden of proof and persuasion and no longer benefits from the rule that a case should be decided in the district where it was first filed. Accordingly, under existing practice, if the party opposing such a transfer is to obtain substantive review, it must have an opportunity to challenge the transfer order (and related orders) in the appellate court for the transferor court's circuit. Otherwise, even a transfer made in clear contravention of applicable law -- or for that matter,

one made for no reason other than to clear a busy docket -- cannot be reviewed.

To resolve the problem, this Court should instruct transferor-circuit appellate courts to exercise their authority where a district judge too hastily implements an order transferring a case out of that circuit. Alternatively, this Court could make it clear that in such a case, transferee courts should not automatically refuse to reconsider the transfer order by giving the order undue weight as the "law of the case." If this Court does not act, the courts of both circuits (transferor and transferee) will continue to leave such orders without substantive review.

Questions of appellate review where a case is transferred between circuits have generated an extraordinary volume of litigation for many years, and the law remains unsettled. See Joan Steinman, Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation, 135 U. Pa. L. Rev. 595 (1987), particularly at pp. 641-648; Stowell R.R. Kelner, Note, "Adrift on an Uncharted Sea:" A Survey of Section 1404(a) Transfer in the Federal System, 67 N.Y.U. L. Rev. 612 (1992); Robert A. Ragazzo, Transfer and Choice of Federal Law: The Appellate Model, 93 Mich. L. Rev. 703 (1995); Richard L. Marcus, Conflicts among Circuits and Transfers within the Federal Judicial System, 93 Yale L.J. 677 (1984). As Steinman (at p. 646) summed up the situation in 1987: "The consequence of all this seems a most unappealing one: that clear errors stand, untouchable." The time has come for resolution.

2. The Eleventh Circuit should issue the requested writ of mandamus to the Atlanta District Court.

The primary use of the writ of mandamus in aid of appellate jurisdiction "is to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943).

In a case such as this one, "[t]he focal question posed . . . is whether the action of the District Court tends to frustrate or impede the ultimate exercise by the Court of Appeals of its appellate jurisdiction granted in some other provision of the law. The answer is clearly in the affirmative where, for example, the order of the District Court transfers a cause to a District Court of another circuit for decision." La Buy v. Howes Leather Company, 352 U.S. 249, 264 (1957) (Brennan, J. dissenting). In La Buy, the four dissenting Justices argued that review via mandamus was available when "the effect of the order is that the district judge has declined to proceed with the determination of a case which could eventually come to [the Court of Appeals] by appeal from a final decision." Id. (internal punctuation and citations omitted). The dissenters disapproved of the La Buy majority's going beyond this narrow use of mandamus to affirm the grant of a writ of mandamus prohibiting the district judge from referring the case to a master pursuant to Rule 53(b), Fed. R. Civ. P., in part because such an order does not deprive the Court of Appeals of its appellate jurisdiction. Id.

Here, the Atlanta District Court exceeded its lawful power when it transferred the case files on the same day that it entered the transfer order, thereby depriving petitioners of their right to seek reconsideration or appellate review in the circuit in which the Atlanta District Court sits. When a court grants a transfer pursuant to 28 U.S.C. §1404(a), it should stay or delay the physical transfer of files for a sufficient period to permit the party opposing transfer to seek judicial review in the circuit of origin of the case. See, e.g., Roofing & Sheet Metal Serv, Inc., v. La Quinta Motor Inns, Inc., 689 F.2d 982, 988-89 n.10 (11th Cir. 1982) ("the prevailing approach is to delay the physical transfer of the papers in a case long enough to allow an aggrieved party the opportunity to file a petition for mandamus"); Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1520 n.9 (10th Cir. 1991) ("the district court should have allowed the parties time to seek certification or file a mandamus petition before physically transferring the record. . . ."); In re Nine Mile Ltd., 673 F.2d 242, 242 (8th Cir. 1982) ("The petitioner correctly argues that in order to permit adequate and orderly review of one federal district court's decision to transfer a case to another federal district court, physical transfer of the file should be delayed for a period of time after entry of the transfer order so that review may be sought in the transferor circuit."); Starnes v. McGuire, 512 F.2d 918, 924, 935 (D.C. Cir. 1974) (en banc) ("[I]t is essential that procedures be adopted and observed that will [sic] provide plaintiffs a fair opportunity to seek review in the transfer circuit prior the physical transfer of the record."); Technitrol, Inc. v. McManus, 405 F.2d 84, 86 (8th Cir. 1968), cert. denied, 394 U.S. 997 (1969) ("the better procedure" is to "hold up

the transfer for a reasonable time pending possible petition for reconsideration or review."). See also Fine v. McGuire, 433 F.2d 499, 501 n.1 (D.C. Cir. 1970) (noting that Court of Appeals itself had successfully requested transferee district court outside of circuit to return file to transferor district court to permit Court of Appeals to consider mandamus petition seeking to vacate transfer order).

In Nine Mile, as in this case, the file was physically transferred on the same day that the transfer order was entered. The Eighth Circuit held, "we have no alternative but to grant the petition for a writ of mandamus," and "we direct the district court and the clerk for the Northern District of Iowa to take every reasonable action possible in asking the District of South Carolina to return the files." 673 F.2d at 244, 244 n.5. The Court further directed that all "future transfer orders be effectuated in accordance with the teachings of Starnes and Technitrol." Id. at 244. See also Chrysler Credit, 928 F.2d at 1521 n.13 ("Our only power would be to direct the Oklahoma court to request that the Michigan court retransfer the action.") (emphasis in original).

In sum, other Circuits have recognized that when a district court acts "hastily" in transferring the record, a diligent petitioner would be wrongfully precluded from seeking appellate review, including via mandamus, in the Circuit of origin. See In re Warrick, 70 F.3d 736, 740 (2d Cir. 1995); NBS Imaging Sys. v. United States Dist. Court for the Eastern Dist. of Cal., 841 F.2d 297, 298 (9th Cir. 1988). These Circuits recognize that a Court of Appeals' need to protect its own jurisdiction "justifies

the rule that when the transferred case has been docketed in the transferee court despite the petitioner's diligence, this court can 'order[ ] a district court in this circuit to request the transferee court to return the case.'" In re Warrick, 70 F.3d at 740 (relying on, inter alia, NRS Imaging Sys., 841 F.2d at 298; In re Nine Mile Ltd., 673 F.2d at 243-44; and Eine, 433 F.2d at 500 n.1).

The Eleventh Circuit itself has cited with approval to Nine Mile, which is factually indistinguishable from this case, suggesting that in this case the Eleventh Circuit should issue the requested writ of mandamus and direct the Atlanta District Court to ask the Maryland District Court to return the file so that petitioners can pursue review of the Order. Roofing, 689 F.2d at 988-89, 988 n.10. The Eleventh Circuit could also make this request itself to the United States District Court for the District of Maryland. See Eine, 433 F.2d at 501 n.1.

The propriety of mandamus as a remedy to review the Atlanta District Court's order is not called into question by Bankers Life & Casualty Co. v. Holland, 346 US 379 (1953), which held that mandamus was not an appropriate remedy to vacate a district court's order granting a transfer of venue under 28 U.S.C. § 1406(a) [not 1404(a)]. The relevant facts sharply distinguish that case from this. In Bankers Life, the Court noted, among other things, that the decision against the petitioner involved no abuse of judicial power, that the petitioner had not met the burden of showing that its right to issuance of the writ of mandamus was clear and indisputable, and that, after transfer, the case would remain within the realm of the same court of

appeals that had denied the writ of mandamus, since both the transferor court and the transferee court were in districts within that same circuit.

For these reasons, petitioners ask this Court to decide that the Eleventh Circuit should issue the requested writ of mandamus and direct the Atlanta District Court to take all reasonable steps to promptly retrieve the case files from the District Court of Maryland.

3. Pursuant to the writ of mandamus, the Eleventh Circuit should direct the Atlanta District Court to decide the issues raised in petitioners' motion to remand the case to state court and (before deciding those issues), as required by the local rules, to permit petitioners to file a reply to respondent's response to that motion.

Petitioning for a writ of mandamus is an established procedure for parties to seek appellate review of the denial of a motion to remand when, as here, the district court has not certified its order for immediate review and there has been no final adjudication. See e.g., Roche, 319 U.S. at 31 n.5 (1932); Colo. v. Symes, 286 U.S. 510, 521 (1932) ("the district judge . . . may permit the accused to show that he is entitled to removal authorized by section 33. If such permission be denied or, if leave being granted, his petition shall fail to meet the requirements of that section, the case is to be remanded to the state court as upon a peremptory writ of mandamus."); Md. v. Soper (No. 1), 270 U.S. 9, 29-30 (1926); Commonwealth of Pa. v. Newcomer, 618 F.2d 246 (3d Cir. 1980) (statute giving Court of

Appeals power to issue all writs necessary or appropriate in aid of its jurisdiction and agreeable to usages and principles of law provides jurisdiction for Court of Appeals to consider petition for writ of mandamus to compel district court to remand to state court state criminal prosecution against federal postal employee).

Admittedly, this case does not present the issue of federal courts interfering with state prosecutions that was presented in the cases cited above. But the procedure of seeking appellate review via mandamus is not limited to such cases. For example, the Fifth Circuit, Unit A, in Poirrier v. Nicklos Drilling Co., 648 F.2d 1063 (5th Cir. Unit A 1981), held that although an order denying a motion to remand was not final and could not be appealed directly unless certified for review by the district court pursuant to 28 U.S.C. § 1292(b), such an order may be reviewed through a petition for writ of mandamus in appropriate cases. Id. at 1064-65. Mandamus was inappropriate in that particular case, however, because the particular legal issue raised by the petitioner in Poirrier (whether maritime actions brought in state court under "savings to suitors" clause could be removed to federal court on diversity grounds) had been decided adversely to him by Circuit precedent. Id. at 1065-66.

Unlike in Poirrier, precedent of the Eleventh Circuit has not decided the underlying legal issues in this case adversely to petitioners. The Eleventh Circuit has held that the bar to maintaining an action caused by a corporation's failure to comply with the predecessor statute of O.C.G.A. § 14-2-1501 (the foreign-corporation qualification requirement)

applied in a diversity action in Georgia unless compliance was waived by the opposing party's failure to raise the issue in the appropriate pleading. Morgan Guar. Trust Co. of N.Y. v. Blum, 649 F.2d 342, 344-345 (5th Cir. Unit B 1981) ("In diversity . . . actions, state law defines the nature of the defenses, but the Federal Rules of Civil Procedure provide the manner and time in which defenses are raised and when waiver occurs.")[2] Moreover, under Eleventh Circuit precedent, a state's forum-closing statute will apply in diversity actions to bar access to the federal court sitting in the forum state unless such application unduly burdens interstate commerce. S & H Contractors, Inc. v. A. J. Taft Coal Co. Inc., 906 F.2d 1507, 1509-1510 (11th Cir. 1990), cert. denied, 498 U.S. 1026 (1991); SAR Mfg. Co. v. Dumas Bros. Mfg. Co. Inc., 526 F.2d 1283, 1285-86 (5th Cir. 1976).

The Georgia Supreme Court has held that, under O.C.G.A. § 14-2-1502, a corporation's failure to comply with O.C.G.A. § 14-2-1501 does not act as a bar to filing suit, but does prevent the corporation from further proceeding with the suit until the required certificate is obtained. Transp. Ins. Co. v. El Chico Rests., Inc., 271 Ga. 774, 774, 524 S.E.2d. 486, 487 (1999). Thus, although O.C.G.A. § 14-2-1502 does not prevent a party from asserting a counterclaim, as respondent did here in the state court, it barred respondent from taking any further action in the state court in pursuit of its

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[2] Decisions of the former Fifth Circuit, Unit B, rendered after September 30, 1981, are binding precedent in the Eleventh Circuit. Maseda v. Honda Motor Co., Ltd., 861 F.2d 1248, 1252 n.3 (11th Cir. 1988).

counterclaim without obtaining the required certificate.[3]

Petitioners squarely presented the issue concerning the Georgia law and its application in the federal court: whether the bar against further proceedings recognized by the Georgia Supreme Court barred respondent in this case from either or both (1) removing the action to federal court; or (2) moving to transfer the action to another federal district. The Atlanta District Court chose not to address any of the multiple, complex issues that the parties briefed and that must be addressed to decide respondent's capacity to maintain an action. These issues include (1) whether respondent was transacting business in Georgia; (2) whether under Georgia conflicts of laws rules, the Georgia courts would apply the door-closing statute to this case and bar respondent's actions; (3) whether respondent had a valid point in claiming the Georgia requirements did not apply because its predecessor was a national bank; and (4) whether application of the Georgia statutes would unduly burden interstate commerce.

Petitioners specifically raised the issue in the Atlanta District Court three times: (1) in their reply to respondent's counterclaim; (2) in their motion to remand; and (3) in their opposition to respondent's motion to transfer. Nonetheless, the District Court refused even to consider the issue.

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[3] The Official Comments to O.C.G.A. §14-2-1502 distinguish between seeking "affirmative relief," which is precluded when the corporation does not have the required certificate, and "defending" an action, which is permitted.

The District Court disposed of petitioners' motion to remand also without permitting petitioners to file a reply addressing the arguments raised by respondent in opposition to the motion to remand. Petitioners were entitled to file a reply under Local Rule 7.1C. The Rule provides that, "A reply by the movant shall be permitted. . . ." Respondent filed its opposition to the motion to remand on September 25, 2001. Petitioners' Reply was not due until October 15, 2001 (and petitioners' counsel were preparing a reply for filing by the due date), yet the District Court ruled on the motion on October 2, 2001, without permitting the Reply and without explaining why a reply was not being permitted. In their reply, petitioners would have responded to the arguments made and issues raised by respondent (e.g., regarding its predecessor's status as a national bank -- which is, at best, a "red herring" -- and its assertion that it has engaged solely in "interstate commerce") and provide additional support for the proposition that respondent is transacting business in Georgia within the meaning of O.C.G.A. §14-2-1501. See, e.g., Winston Corp. v. Park Elec. Co., 126 Ga. App. 489, 191 S.E.2d 340 (1972) (whether corporation is transacting business in Georgia is question of fact to be resolved on ad hoc or case-by-case basis and is not governed by mechanical rules).

By not permitting a reply, the District Court acted akin to those courts that granted transfers without providing a meaningful opportunity for argument or a hearing. As in those cases, here, too, the Eleventh Circuit should vacate the Order as a matter of fundamental fairness. See, e.g., Fine, 433 F.2d at 501 ("[A]s a matter of fundamental fairness

the judge must accord an opportunity to be heard. . . .").[4]

In sum, in a diversity action, a federal court cannot entertain a state law claim if the courts of the forum could not entertain the same claim. E.g., Kinetic Concepts, Inc. v. Kinetic Concepts, Inc., 601 F. Supp. 496, 499 (N.D. Ga. 1985); R. N. Kelly Cotton Merch., Inc. v. York, 379 F. Supp. 1075, 1078 (M.D. Ga. 1973) (in diversity case, "plaintiff may not assert substantive rights in this court which it may not assert in the courts of Georgia"). The Atlanta District Court should decide whether respondent was transacting business in Georgia and, if so, whether its failure to obtain a certificate of authority to transact such business barred it from, inter alia, seeking relief in the form of removal to federal court and transfer to the Maryland District Court.

4. Pursuant to the petition for mandamus, the Eleventh Circuit should review and vacate the Atlanta District Court's order transferring the case to Maryland.

Although a transfer order under § 1404 is neither a final appealable order, nor, generally, a reviewable collateral order, the Eleventh Circuit (and most others) will entertain a mandamus petition to review a transfer order. Roofing, 689 F.2d 982 at

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[4] The Eine court followed its usual procedure of not directing an order to the district judge, but of transmitting its opinion to the district judge for further consideration consistent with the opinion. 433 F.2d at 501 n.4.

988. Accord, In re Scott, 709 F.2d 717, 719 (D.C. Cir. 1983); Ukiah Adventist Hosp. v. F.T.C., 981 F.2d 543, 546 (D.C. Cir. 1992); Golconda Mining Corp. v. Herlands, 365 F.2d 856, 857 (2d Cir. 1966); see also 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3855 (1986 & Supp. 2001) (collecting cases from every circuit).

Although the remedy of mandamus is drastic, "exceptional circumstances . . . will justify the invocation of this extraordinary remedy." Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980) (per curiam). Various Circuits have approved of the writ of mandamus to review and vacate transfer orders (1) to prevent abuses of a district court's authority to transfer a case, In re Chatman-Bey, 718 F.2d 484, 486 (D.C. Cir. 1983) (per curiam); (2) where there has been no argument or opportunity for a hearing, Fine, 433 F.2d at 501-02; (3) "to redress a clearcut abuse of discretion," A. Olinick & Sons v. Dempster Brothers, Inc., 365 F.2d 439, 445 (2d Cir. 1966); (4) when "the right of the party seeking mandamus is clear and indisputable, [a standard which] requires considerably more strained circumstances than does a mere abuse of discretion," In re Ralston Purina Co., 726 F.2d 1002, 1005 (4th Cir. 1984); and (5) when the trial court's action was "without any possible basis for judgment of discretion, so as legally to involve abuse of judicial power and responsibility." Toro Co. v. Alsop, 565 F.2d 998, 1000 (8th Cir. 1977).

The Atlanta District Court's decision granting the transfer fails under one or more of the standards set forth above. The Atlanta District Court ignored the "first to file" rule despite the absence of

compelling circumstances warranting a departure from that rule, and it effectively placed the burden of proof and persuasion on that transfer motion on petitioners in clear contravention of applicable law. Indeed, because of respondent's failure to comply with Georgia's business qualification statute, respondent should not have been permitted even to seek a transfer.

The "first to file" rule holds that when parties have instituted competing or parallel litigation in separate federal courts, the court initially having jurisdiction should hear the case absent "compelling circumstances." E.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, 675 F.2d 1169, 1174 (11th Cir. 1982) ("In absence of compelling circumstances, the court initially seized of a controversy should be the one to decide the case").

Nothing in either respondent's motion for transfer or the Atlanta District Court's Order establishes the existence of "compelling circumstances" warranting a departure from the "first to file" rule. Rather, in ordering the transfer the District Court cited the following factors:

1. Railcar is a Georgia corporation with its principal office in the Northern District of Georgia. Nevertheless, it appears to the Court that the principal dispute is between Progress Rail and Allfirst. Progress Rail is an Alabama corporation. Therefore, the Court will not give to Plaintiffs the deference that they would receive if this action had been filed in their home forum.

2. The President of Railcar and Vice President of Progress Rail resides in Clearwater, Florida. The former President of Railcar resides in Spring Island, South Carolina. Litigating this case in Maryland would not be significantly more inconvenient to them than litigating the case in Atlanta, Georgia.
3. On the other side of the equation, there are significant advantages to transferring this action to the United States District Court for the District of Maryland. There is already pending in that district an action filed by Allfirst against Progress Rail and Railcar. Allowing the cases to be consolidated would avoid the possibility of duplicative litigation and inconsistent outcomes.
4. It is undisputed that the agreements are governed by Maryland law. It is in the interest of justice to have the case handled by a judge who is more familiar with Maryland law than the undersigned.
5. Finally, the fact that Plaintiffs consented in the FLDG to being sued in state or federal court in Maryland is a factor that weighs in favor of transfer.

The Atlanta District Court concluded that the cited factors collectively clearly outweighed petitioners' choice of forum.

As to the first and second factors cited by the District Court, the District Court ignored that:

i. Substantially all events relating to the claims

asserted by petitioners against respondent occurred in Georgia, and respondent was present in Georgia in connection with certain of those events;

ii. Petitioners' offices, resources, information, and personnel involved in matters related to this case are in Georgia;

iii. Although the current President of Railcar and Senior Vice President of Progress resides in Clearwater, Florida, he regularly travels to Atlanta to conduct business for both petitioners;

iv. Although the former President of Railcar now resides on Spring Island, South Carolina, he regularly travels to Atlanta;

v. Although Progress is an Alabama corporation, it is qualified to do business in Georgia, has offices in Atlanta, conducts substantial business in Atlanta and elsewhere in Georgia, operates a locomotive facility in Georgia, and has a number of subsidiaries, including Railcar, located in Georgia;

vi. Petitioners and respondent have had an ongoing business relationship established approximately ten years ago in furtherance of which respondent has visited petitioners in Georgia numerous times;

vii. Petitioners have acted as respondent's agent in Georgia (with authority to act in respondent's name and on respondent's behalf) and therefore respondent is conducting business in Georgia with respect to every action which petitioners have taken on respondent's behalf in Georgia; stated another way, respondent itself is in fact in Georgia;

and

viii. Railcar is a real party in the Georgia action with real claims asserted against respondent; Railcar seeks significant relief in the form of a declaration that it has not breached any of its obligations under the agreements at issue. Allfirst alleges that Railcar has breached its agreement with Allfirst, is therefore in default, and should be ordered to pay damages as well as specifically perform under the various agreements at issue. Moreover, there is not even a suggestion that Railcar joined in the action for any improper purpose.

The second factor cited by the District Court establishes merely that a transfer will shift inconvenience from one party to the other. See, e.g., Peridyne Tech. Solutions, LLC v. Matheson Fast Freight, Inc., 117 F. Supp.2d 1366, 1373 (N.D. Ga. 2000).

The third and fourth factors cited by the District Court cannot stand. No showing was made by respondent that the Maryland law applicable to the Agreements differs in any respect from Georgia law (or that any differences would be difficult for the Atlanta District Court to understand and apply) so as to justify a transfer based on judicial expertise in Maryland law. Moreover, even if it may be true that consolidation of the two actions would be in the interest of judicial economy, that does not answer which case should be transferred.

As to its fifth cited factor, the District Court appears to have given great weight to a permissive

choice-of-forum clause in the FLDG (the "FLDG Provision") (signed only by Progress, and not by Railcar), which reads as follows:

> [Progress] agrees that any action or proceeding arising out of or relating to this Guaranty may be commenced in any state or federal court in the State of Maryland and agrees that a summons and complaint commencing an action or proceeding in any such court shall be properly served and shall confer personal jurisdiction if served as provided under the laws of the State of Maryland.

The FLDG Provision does not override the first-to-file rule.

The parties' principal claims center on the Service Agreement and the Assignment Agreement, neither of which has any similar jurisdictional provision.

Even if the Service Agreement and Assignment Agreement included a similar jurisdictional provision, such a provision would not override the first-filed rule, because it is merely a permissive provision specifying a nonexclusive forum. The FLDG Provision does not purport to limit venue to courts in Maryland. Nor does it waive Progress's (or Railcar's) right to sue Allfirst in a different forum or to contend that a forum in Maryland is inconvenient. It provides merely that an action arising out of or

relating to the FLDG "may" be commenced in a court in Maryland. Such a provision is not at all comparable to the mandatory, exclusive forum selection clauses that may override the first-filed rule. Federal courts, including courts in the Eleventh Circuit, have sharply distinguished permissive, nonexclusive clauses from mandatory, exclusive clauses. In determining whether to dismiss or transfer a case where the first-filed suit has been brought in a forum not specified in the clause, permissive clauses are given little, if any, weight. Citro Fla., Inc. v. Citrovale, S.A., 760 F.2d 1231 (11th Cir. 1985) (district court erred in dismissing suit on basis of a forum selection clause that was merely nonexclusive consent by plaintiff to jurisdiction elsewhere); Snapper, Inc. v. Redan, 171 F.3d 1249, 1262, n.24 (11th Cir. 1999) (acknowledging that federal courts, including Eleventh Circuit, distinguish between mandatory and permissive forum selection clauses and refuse to dismiss suit or transfer action to specified forum when clause is permissive; a permissive clause can be given weight, however, when the plaintiff [in the first-filed or only suit] has filed the suit in the forum specified in the clause); Keaty v. Freeport Indon., Inc., 503 F.2d 955 (5th Cir. 1974) (held, district court erred in dismissing suit based on permissive/nonexclusive forum selection clause; district court should proceed to merits of contract dispute between parties). Where a district court has given significant weight to a permissive forum selection clause, the appellate court has reversed. See e.g., Autoridad de Energia Electrica de P.R. v. Ericsson, Inc., 201 F.3d 15 (1st Cir. 2000) (district court improperly remanded removed action to Puerto Rico courts on basis of nonexclusive forum selection clause in which parties agreed to submit to

jurisdiction of courts of Puerto Rico).

Petitioners have found no case (where the plaintiff brought a first-filed suit in a forum not specified in the forum selection clause) that has given substantial or significant weight to a merely permissive clause specifying another forum.

Even where a forum-selection clause is mandatory/exclusive or where the first-filed (or only) suit is filed in the forum specified in the clause (neither of which is true here), a valid forum-selection clause affects only one of the factors -- convenience of the parties -- that a district court must consider in a motion under 28 U.S.C. § 1404(a). Plum Tree, Inc. v. Stockment, 488 F.2d 754, 757 (3d Cir. 1973). The other factors are the convenience of witnesses and the interest of justice. These "are third party or public interests that must be weighed by the district court; they cannot be automatically outweighed by the existence of a purely private agreement between the parties." Plum Tree, 488 F.2d at 758. Moreover, as noted, Railcar executed no agreement consenting to being sued in Maryland.

Not only are each of the factors cited in the Order as favoring Maryland effectively neutralized by the key facts of this case, but also the factors cited in the Order could not, individually or collectively, "clearly outweigh" petitioners' choice of forum.

The Atlanta District Court's Order establishes a clear abuse of discretion and shows that the District Court failed to consider and apply the

relevant factors under controlling applicable law and the facts of the case.

In addition, and perhaps most importantly, the Atlanta District Court effectively (and improperly) shifted the burden to petitioners by permitting a transfer without requiring respondent to make a specific showing that key witnesses will be inconvenienced if the case remained before the Atlanta District Court. See e.g., Elect. Transaction Network v. Katz, 734 F. Supp. 492, 502 (N.D. Ga. 1989). Precedent in the Atlanta District Court's district requires a respondent to "list names and addresses of witnesses and the nature of their testimony, the necessity of their testimony to [its] case, and why [it] cannot properly present [its] case by using their depositions." Grey v. Cont'l Mktg. Assocs., Inc., 315 F. Supp. 826, 831 (N.D. Ga. 1970). Accord, Plum Tree, Inc., 488 F.2d at 756, 757, 757 n.2. Respondent did none of this. Instead, respondent summarily said in its brief that, "A Maryland forum is no more convenient or inconvenient for witnesses than a Georgia forum. . . ." Not only is this assertion unsupported and untrue, it is insufficient as a matter of law to justify a transfer. Under similar circumstances, in a mandamus proceeding, the Third Circuit vacated a transfer order because the movants failed to provide evidentiary support for their motion to transfer. Among deficiencies noted, the movants, like respondent here, had not provided:

> a list of the names and addresses of witnesses whom the moving party plans to call and affidavits showing the materiality of

> the matter to which these witnesses will testify, statements by the moving parties of the business difficulties or personal hardships that might result from their having to defend against the suit in the district court where it was originally brought, [and] affidavits concerning the relative ease of access to sources of documentary evidence. . . .

Plum Tree, 488 F.2d at 757 n.2.

In sum, respondent did not meet its burden to show compelling circumstances warranting the District Court's ignoring the "first to file" rule, and did not meet its burden under 28 U.S.C. § 1404(a) to show that other circumstances clearly outweigh petitioners' choice of forum. The District Court effectively placed the burden of persuasion and proof on the motion to transfer on petitioners, in clear contravention of applicable law. Appellate review and reversal of the transfer decision via mandamus is appropriate now.

5. Whether or not the Atlanta District Court recovers the case files, this Court may grant petitioners' request. Even if the Atlanta District Court's transfer of the case files has divested the Eleventh Circuit of its appellate jurisdiction over the case, it has not divested the appellate jurisdiction of this Court. Accordingly, as an alternative to making the Eleventh Circuit's review dependent on the retrieval of the case files, petitioners request this Court itself to (i) direct the Atlanta District Court to

decide the issues raised in petitioners' motion to remand the case to state court and, as required by the local rules, to permit petitioners to file a reply to respondent's response to that motion, and (ii) review and vacate the Atlanta District Court's order transferring the case to the Maryland District Court.

In fact, however, recovering the physical files should not be a prerequisite for review of the Order by the Eleventh Circuit. By what authority does a district court's physical transfer of paper divest the court of appeals of its appellate jurisdiction? Nothing in the applicable statute, 28 U.S.C. § 1294, makes the appellate jurisdiction of a court of appeals depend on whether the district court in its circuit has retained possession of the case records. Nor does the doctrine that appellate jurisdiction vanishes with the case files have any other statutory support. Nonetheless, the doctrine is widely held. See generally C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3846 and the cases cited therein. While the doctrine may provide a useful rule of thumb, it should not trump the statute. We request this Court to clarify that in a case such as this, even if the court of appeals for the transferor circuit cannot recover the physical files, it still has appellate jurisdiction for purposes of reviewing the transfer order.

CONCLUSION

For these reasons, petitioners respectfully request this Court to grant the requested writ of certiorari to the Court of Appeals for the Eleventh Circuit, to settle an important question of federal law

concerning appellate review of inter-circuit transfers and thereby resolve the problem of jurisdictional limbo in which the transfer order and related orders are unreviewable by any court.

Respectfully submitted this 1st day of April, 2002.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-16231-A

IN RE:

PROGRESS RAIL SERVICES CORPORATION,

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Northern District of Georgia

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BEFORE: EDMONDSON and WILSON, Circuit Judges.

BY THE COURT:

The Petition for writ of mandamus is DENIED. The Court notes that Petitioner may file a motion to re-transfer the case in the United States District Court for the District of Maryland, and that, should its motion for review be denied, appellate review of the order is available. See Roofing & Sheet Metal Services, Inc. v. La Quinta Motor Inns, Inc., 689 F.2d 982, 989 (11th Cir. 1982).

Filed U.S. Court of Appeals Eleventh Circuit
Dec 31 2001 Thomas K. Kahn

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PROGRESS RAIL SERVICES CORPORATION and RAILCAR, LTD.,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION FILE NO. 1:01-V-2284-TWT
ALLFIRST BANK,	)	
Defendant.	)	

ORDER

This is a declaratory judgment action arising out of the financing of used railcars. It is before the Court on the Defendant's Motion to Dismiss [Doc. 5-1] and Motion to Transfer [Doc. 5-2], and the Plaintiffs' Motion to Remand [Doc. 12]. For the reasons set forth below, the Motion to Dismiss [Doc. 5-1] and Plaintiffs' Motion to Remand [Doc. 12] are denied and the Motion to Transfer [Doc. 5-2] is granted.

I. BACKGROUND

Plaintiff Progress Rail is an Alabama corporation. Plaintiff Railcar is a Georgia corporation. Defendant Allfirst is a Maryland bank. In November, 1998, Allfirst, Progress Rail and Railcar executed three agreements. This Assignment Agreement transferred title to 996 rail cars from Progress Rail to Allfirst. The agreement also assigned the existing leases of those cars to Allfirst and provided for Allfirst to make certain advances to Progress Rail consistent with the value of the cars and leases. Progress Rail acted as Allfirst's agent to collect rentals and to release or sell the rail cars. The First Loss Deficiency Guaranty obligated Progress Rail to guarantee certain minimum rental payments and stipulated loss values for the rail cars. The Service Agreement obligated Progress Rail to perform certain repair and maintenance work upon the rail cars.

In 1999 and 2000, the leases began to expire and the railroads returned the leased rail cars to Progress Rail. Plaintiffs contend that the market for leased coal cars had collapsed, and that the cars could not be re-leased. Allfirst contends that Progress Rail was obligated to repair the cars regardless of the economical value of the cars and to guarantee the minimum rentals called for by the Assignment Agreement. Progress Rail contends that its liability for loss of value was limited to 9.995% of the value of the leased cars and that it has paid $1.6 million more than it was obligated to pay pursuant to the First Loss Deficiency Guaranty. This is a gross oversimplification of the facts, but is sufficient to address the pending motions.

II. DISCUSSION

A. MOTION TO DISMISS

Allfirst contends that this action should be dismissed because it is a gunjumping declaratory judgment action. It contends that the sole purpose of the suit is to deprive Allfirst of litigating this matter in its forum of choice in Maryland. "In its discretion, a district court may decline to entertain a declaratory judgment action on the merits when a pending proceeding in another court will fully resolve the controversy between the parties." Ven-Fuel, Inc. v. Department of the Treasury, 673 F.2d 1194, 1195 (11th Cir. 1982). That discretion, however, is limited where other claims for coercive relief are included in a declaratory judgment action. Southwind Aviation, Inc. v. Bergen Aviation, Inc., 23 F.3d 948, 951 (5th Cir. 1994). This action is primarily a declaratory judgment action, but the Plaintiffs are seeking damages for the alleged overpayment under the First Loss Deficiency Guaranty. Therefore, the Motion to Dismiss should be denied.

B. MOTION TO TRANSFER

Allfirst contends that this action should be transferred to Maryland because of a forum selection clause in the First Loss Deficiency Guaranty and for the convenience of the parties and witnesses. "The federal courts traditionally have accorded a plaintiff's choice of forum considerable deference." In re Ricoh Corp. 870 F.2d 570, 573 (11th Cir. 1989). "When, however, the parties have entered into a contract containing a valid,

reasonable choice of forum provision, the burden of persuasion is altered." Id.

In attempting to enforce the contractual venue, the movant is no longer attempting to limit the plaintiff's right to choose its forum; rather the movant is trying to enforce the forum that the plaintiff had already chosen: the contractual venue. In such cases, we see no reason why a court should accord deference to the forum in which the plaintiff filed its action. Such deference to the filing forum would only encourage parties to violate their contractual obligations, the integrity of which are vital to our judicial system. Id.

It is true that the forum selection clause in this case can be characterized as permissive in that it permits but does not require an action against Plaintiffs to be pursued in state or federal court in Maryland. It is also true, as Plaintiffs argue, "that the federal courts distinguish between "mandatory" and "permissive" forum selection clauses." Snapper, Inc. v. Redan, 171 F.3d 1249, 1262, n. 24 (11th Cir. 1999). "They err, however, in concluding that these decisions hold that permissive clauses are unenforceable in the sense that the clauses are effectively read out of the contract." Id. Therefore, the forum selection clause is a factor to be considered in determining whether to transfer the case for the convenience of the parties and witnesses.

"For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. §1404(a). The plaintiff's choice of forum,

however, should not be disturbed unless other considerations clearly outweigh it. Robinson v. Giarmarco & Bill, P.C., 74 F.3d 253, 260 (11th Cir. 1996); 74 F.3d 253, 260 (11th Cir. 1996); see also Thornwood Lease Plan, Inc. v. Action AD of Tidewater, Inc., 650 F. Supp. 34, 38 (N.D. Ga. 1986) ("Absent clear justification, courts in this district have consistently refused to override a plaintiff's choice of forum, especially where, as here, the plaintiff has brought suit in his home district."). Greater deference is given where the plaintiff has chosen its home forum. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255-56 (1981).

Railcar is a Georgia corporation with its principal office in the Northern District of Georgia. Nevertheless, it appears to the Court that the principal dispute is between Progress Rail and Allfirst. Progress Rail is an Alabama corporation. Therefore, the Court will not give to the Plaintiffs the deference that they would receive if this action had been filed in their home forum. The President of Railcar and Vice President of Progress Rail resides in Clearwater, Florida. The former President of Railcar car resides in Spring Island, South Carolina. Litigating this case in Maryland would not be significantly more inconvenient to them than litigating this case in Atlanta, Georgia. On the other side of the equation, there are significant advantages to transferring this action to the Unites States District Court for the District of Maryland. There is already pending in that district an action filed by Allfirst against Progress Rail and Railcar. Allowing the cases to be consolidated would avoid the possibility of duplicative litigation and inconsistent outcomes. It is undisputed that the agreements are governed by Maryland law. It is the

interest of justice to have the case handled by a judge who is more familiar with Maryland law than the undersigned. Finally, the fact that the Plaintiffs consented in the First Loss Deficiency Guaranty to being sued in state or federal court in Maryland is a factor that weights in favor of transfer. Collectively, these factors clearly outweigh the Plaintiff's choice of forum. Therefore, the motion to transfer should be granted.

C. MOTION TO REMAND

Plaintiff's Motion to Remand [Doc. 12] is based upon O.C.G.A. §14-2-1501. In the absence of a showing of a similar statute in Maryland, the motion should be denied in light of the transfer.

III. CONCLUSION

For the reasons set forth above, the Defendant's Motion to Dismiss [Doc. 5-1] is DENIED. The Motions to Transfer [Doc. 5-2] is GRANTED. Plaintiff's Motion to Remand [Doc. 12] is DENIED. The Clerk is directed to transfer this case to the United Stated District Court for the District of Maryland.

SO ORDERED, this 1 day of October, 2001.

/s/_____
THOMAS W. THRASH, JR.
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PROGRESS RAIL SERVICES CORPORATION and RAILCAR, LTD.,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION FILE NO. 1:01-V-2284-TWT
ALLFIRST BANK,	)	
Defendant.	)	

ORDER

This is a breach of contract action. It is before the Court on the Plaintiffs' Motion to Certify [Doc. 21-1] and Motion to Vacate [Doc. 21-2]. On October 2, 2001, the Court entered an order transferring this case to the United States District Court for the District of Maryland. This Court lost jurisdiction of the case when it was transferred to the United States District Court for the District of Maryland. In re Miller, 485 F.2d 74, 76 (5th Cir. 1973) ("The District Court in Florida relinquished jurisdiction over the case when it transferred the matter to the Louisiana District Court.") The Plaintiffs' Motion to

Certify [Doc. 21-1] and Motion to Vacate [Doc. 21-2] are DENIED.

SO ORDERED, this 4th day of January, 2002.

/s/
Thomas W. Thrash, Jr.
United States District Judge